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No. 71-527

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

UNITED STATES OF AMERICA,
Appellant

v.

STANDARD OIL COMPANY OF CALIFORNIA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

MOTION TO AFFIRM

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, Standard Oil Company of California moves that the judgment of the District Court be affirmed.

STATUTES INVOLVED

Section 3 of the Sherman Act applies to a contract, combination, or conspiracy in restraint of trade or commerce:

> "* * * in any Territory of the United States or of the District of Columbia, or * * * between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations * * *" (15 U.S.C. § 3).

Section 4 of the Sherman Act provides:

> "The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 of this title * * *" (15 U.S.C. § 4).[1]

QUESTIONS PRESENTED

Whether the words "Territory" and "Territories" in Section 3 of the Sherman Act are limited to land areas organized by Act of Congress.

A subsidiary, but related, question is whether American Samoa has been organized by Act of Congress.

STATEMENT

The District Court dismissed this action for lack of jurisdiction. The action, brought under Section 3 of the Sherman Act, charged antitrust violations in American Samoa (Compl., par. 7). The District Court held that the word "Territories" as used in Section 3 has a political meaning, to wit, land areas organized by an organic act of Congress, not a general geographic meaning which included all land areas. It held that American Samoa is not "organized," is not thus a "Territory," and that, accordingly, the Sherman Act by its terms does not apply to American Samoa.

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1. Sections 1-2 of the Sherman Act apply, by their terms, to trade or commerce "among the several States, or with foreign nations" (15 U.S.C. §§ 1, 2), and are not here applicable. Sections 5-7 do not create substantive offenses, but relate to additional parties (§ 5), forfeiture of property in transit (§ 6), and the definition of "person" (§ 7).

A. Facts.

American Samoa is a group of seven islands in the Southwest Pacific. The islands are approximately 1,565 miles northeast of Aukland, New Zealand, and 2,276 miles southwest of Honolulu.

The islands, from east to west, are an uninhabited coral atoll; the Manua group—Ta'u (17 square miles), Olosega (2 square miles), and Ofu (3 square miles); Aunu'u (1 square mile); Tutuila (52 square miles), where the capital, Pago Pago, is located; and northward of Tutuila about two hundred miles, a low coral atoll named Swains Island, one of the Guano Islands bonded to the United States under the Act of August 18, 1856 (11 Stat. 119, 48 U.S.C. § 1411, et seq.). Altogether the total land area is 76 square miles, about the size of the District of Columbia.

Except for the two atolls, the islands are mountainous. They lack mineral resources and have limited land area suitable for agricultural purposes. Their primary asset is the harbor at Pago Pago.

In 1970, American Samoa's population was approximately 26,000; nearly all the population is Polynesian, and four-fifths live on the main island of Tutuila.[2]

1. INITIAL RELATIONSHIP OF AMERICAN SAMOA TO THE UNITED STATES.

In 1838, Lt. Charles Wilkes, U.S.N., made a survey of the Samoan Archipelago for use as a possible naval station. In 1839, Lt. Wilkes entered into commercial regulations with the principal chiefs of the Samoan Islands (eastern and western Samoa) concerning foreign shipping, but these

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2. American Samoa is the eastern portion of the Samoan Archipelago, which has a total of 15 islands. The 8 western islands have a total land area of 1,133 square miles; in the years following World War I, they were administered by New Zealand, first under a League of Nations' mandate, then as a trust territory of the United Nations. In 1962, they became the independent self-governing nation of Western Samoa.

regulations were not approved by Congress (1 Treaties and Other International Agreements of the United States of America 1776-1949, Department of State Publication 8407 [hereinafter "1 Treaties"] 3-4).

In 1879, the governments of the United States, Britain and Germany entered into an agreement with the chiefs of the Government of Samoa (eastern and western Samoa) which recognized certain neutral areas in the Samoan Islands in the event of war between the signatory nations (1 Treaties 63-64).

In 1880, after a civil war in the Samoan Islands, the United States, Britain and Germany entered into an agreement with the King and Government of Samoa, in which they undertook to support the King, to join in the selection of a successor, and to form an executive council for the King and Government of Samoa, consisting of a citizen of the United States, a British subject, and a German (1 Treaties 68-70).

On February 4, 1890, the Senate of the United States gave its advice and consent to the ratification of a "Treaty of Neutrality and Autonomous Government in Samoa (General Act of Berlin)" with Britain and Germany. Article I of the Treaty provided:

> "* * * the Islands of Samoa are neutral territory in which the citizens and subjects of the Three Signatory Powers have equal rights of residence, trade and personal protection. The Three Powers recognize the independence of the Samoan Government and the free right of the natives to elect their Chief or King and choose their form of government according to their own laws and customs. Neither of the Powers shall exercise any separate control over the Islands or Government thereof" (1 Treaties 117, 26 Stat. 1498).

The Treaty was ratified by the President of the United States on February 21, 1890, and became effective April 12, 1890.[3]

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3. The Sherman Act, including Section 3 thereof, became effective July 2, 1890 (26 Stat. 209).

2. CESSION OF ISLANDS OF AMERICAN SAMOA; ASSERTION OF JURISDICTION OVER SWAINS ISLAND.

In January, 1900, the Senate gave its advice and consent to ratification of a special convention with Britain and Germany which annulled all previous treaties, conventions, and agreements relating to Samoa (1 Treaties 276, 31 Stat. 1878). Britain and Germany renounced in favor of the United States all rights and claims with respect to the island of Tutuila, and all other islands of the Samoan group east of Longitude 171° west of Greenwich (collectively the islands of Eastern Samoa). The United States renounced in favor of the other signatories all rights and claims with respect to all islands of the Samoan group west of that Longitude (collectively the islands of Western Samoa). President McKinley ratified the convention, and it became effective February 16, 1900 (1 Treaties 276, 31 Stat. 1878).[4]

(a) Cession.

In April, 1900, the high chiefs of Tutuila ceded the two Eastern Samoan islands of Tutuila and Aunu'u to the United States. The cession was voluntary. It provided that the United States would

> "• • • respect and protect the individual rights of all people dwelling in Tutuila to their lands and other property in said District";

and that the Chiefs would be entitled to

> "• • • retain their individual control of the separate towns, if that control is in accordance with the laws of the United States of America concerning Tutuila, and if not obstructive to the peace of the people and the ad-

4. In February, 1900, contemporaneously with the convention, the United States Senate gave its advice and consent to ratification of a treaty which provided for a settlement of claims of citizens of the United States, British subjects and Germans on account of hostilities of the three nations in the islands of Samoa (1 Treaties 273-275, 31 Stat. 1875). The President ratified the treaty on March 5, 1900, and it became effective March 7, 1900.

vancement of civilization of the people, subject also to the supervision and instruction of said government."

In July, 1904, the King and Chiefs of Manua ceded four other islands of Eastern Samoa to the United States. The instrument of cession provided, among other things, that:

> "• • • the rights of the Chiefs in each village and of all people concerning their property according to their customs shall be recognized."[5]

On February 20, 1929, Congress accepted the cessions, which were ratified and confirmed as of their effective dates, 1900 and 1904 (45 Stat. 1253, 48 U.S.C. 1661(a)). The resolution of acceptance, in part, stated:

> "Until Congress shall provide for the government of such islands, all civil, judicial, and military powers shall be vested in such manner as the President of the United States shall direct • • •" (45 Stat. 1253, 48 U.S.C. § 1661(c)).

(b) Swains Island.

Earlier, in 1925, Congress adopted a resolution which recited that the remaining atoll in the islands of Eastern Samoa, Swains Island, was included in the list of Guano Islands appertaining to the United States, bonded thereto under the Act of August 18, 1856 (11 Stat. 119, 48 U.S.C. § 1411, et seq.), and that the island had been in the continuous possession of the United States for over 50 years. It provided:

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5. The provisions concerning the rights of the chiefs and property rights in the 1900 and 1904 cession instruments referred to the Samoan system of communal landholding, whereby each family group under a chief ("Matai") held title to its lands in common. In 1890, the General Act of Berlin had prohibited alienations of land in the islands of Samoa to non-Samoans, "[i]n order that the native Samoans may keep their lands for cultivation by themselves and by their children after them" (1 Treaties 120). These restraints on alienation, and the communal landholding system, are still in existence in Samoa.

> "• • • sovereignty of the United States over American Samoa is extended over Swains Island, which is made a part of American Samoa and placed under the jurisdiction of the administrative and judicial authorities of the government established therein by the United States" (43 Stat. 1357, 48 U.S.C. § 1662).

Swains Island was the seventh, and last, of the islands now known as American Samoa.

B. Proceedings Below.

The District Court heard argument and received extensive briefing—two briefs by the government, two by the defendant—on the motion to dismiss, The defendant's briefs brought before the District Court statutory and other materials which showed not only why Congress excluded American Samoa from the Sherman Act, but also why it took no action to bring American Samoa under Section 3 when it enacted the Clayton amendments in 1914. The defendant's briefs, together with the public documents referred to therein, are a part of the record now before this Court.

ARGUMENT

The action of the District Court in dismissing the suit was manifestly correct, and the government's contentions to the contrary are so insubstantial as not to require further argument. Congress has consistently recognized a distinction between "Territories" and other places under the jurisdiction of the United States. So also have the decisions of this Court and the lower Federal courts. American Samoa is an unorganized possession, and thus is not a "Territory" within the meaning of Section 3 of the Sherman Act or other Federal statutes relating to "Territories."

A. Statutory Differentiation Between "Territory" and Other Possessions or Land Areas Under the Jurisdiction of the United States.

In numerous statutes, enacted both before and after the Sherman Act, Congress has consistently recognized a distinction between "Territories," on the one hand, and other land areas within the jurisdiction of the United States, on the other hand. Where the statute is intended to refer to organized Territories, the words "Territory" or "Territories" are used; where the statute is intended to have a broader application, to both Territories and possessions, the statute specifically so provides. To quote a representative cross section of the statutes:

1. STATUTES ENACTED PRIOR TO THE SHERMAN ACT.

(a) Organic Acts:

In the organic act of Wisconsin (Act of April 20, 1836; 5 Stat. 10), Congress provided:

> "• • • [t]hat from and after the third day of July next, the *country* included within the following boundaries shall constitute a *separate Territory*, for the purposes of temporary government, by the name of Wisconsin • • •" (emphasis added).

The organic acts of Utah (Act of September 9, 1850; 9 Stat. 453); Colorado (Act of February 28, 1861; 12 Stat. 172); Dakota (Act of March 2, 1861; 12 Stat. 239); Idaho (Act of March 3, 1863; 12 Stat. 808); Montana (Act of May 26, 1864; 13 Stat. 86); and Wyoming (Act of July 25, 1868; 15 Stat. 178)—all based on the Wisconsin organic act—draw a similar distinction, to-wit:

> "• • • [t]hat all that part of the *territory* of the United States included within the following limits, viz.: • • • is hereby erected into a temporary government by the name of the *Territory* of [Colorado, Dakota, etc.]" (12 Stat. 172) (emphasis added).

(b) Civil Rights Act of 1866:

"All citizens of the United States shall have the same right, in every * * * *Territory*, as is enjoyed by white citizens thereof to * * * purchase, lease, sell, hold and convey real * * * property" (14 Stat. 27, 42 U.S.C. § 1982) (emphasis added).

(c) Civil Rights Act of 1870:

"All persons within the jurisdiction of the United States shall have the same right in every * * * *Territory* to make and enforce contracts * * * as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other" (16 Stat. 144, 42 U.S.C. § 1981) (emphasis added).

(d) Civil Rights Act of 1871:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage of any * * * *Territory*, subjects, or causes to be subjected, any citizen of the United States or * * * person within the jurisdiction thereof to the deprivation of rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured * * *" (17 Stat. 13, 42 U.S.C. § 1983) (emphasis added).

(e) Proof of Public Records Statute (1872):

"All records * * * which may be kept in any public office of *any* * * * *Territory, or of any country subject to the jurisdiction of the United States,* * * * shall be proved or admitted in any court or office in any other * * * *Territory, or in any such country,* by the attestation of the keeper of said records * * * *" (R.S. § 906, repealed 62 Stat. 993; a similar provision appears in the 1948 Judicial Code, 28 U.S.C. § 1739) (emphasis added).

(f) Polygamy Statute (1882):

"No polygamist, bigamist, or any person cohabiting with more than one woman * * * *in any Territory or*

other place over which the United States has exclusive jurisdiction, shall be entitled to vote at any election held *in any such Territory, or other place,* or be * * * entitled to hold office * * * in, under, or for *any such Territory or place,* or under the United States" (22 Stat. 31, 48 U.S.C. § 1461) (emphasis added).

(g) Carnal Knowledge Statute (1889):

"* * * every person who shall carnally and unlawfully know any female under the age of sixteen years * * * in the District of Columbia *or other place, except the territories,* over which the United States has exclusive jurisdiction; or on any vessel * * * out of the jurisdiction of *any State or Territory,* shall be guilty of a felony * * *" (25 Stat. 658) (emphasis added).

2. STATUTES ENACTED SUBSEQUENT TO THE SHERMAN ACT.

(h) Federal Food and Drug Act (1906):

"* * * any article of food, drug, or liquor that is adulterated or misbranded * * * and is being *transported from one State, Territory, District, or insular possession to another* for sale * * * (34 Stat. 771, repealed 52 Stat. 1059; similar provisions now appear at 21 U.S.C. §§ 301, 332, 334, 337) (emphasis added).

(i) Panama Canal Act (1912):

"* * * all laws relating to the rendition of fugitives from justice *as between the several States and Territories* of the United States, shall extend to and be considered in force in the Canal Zone, *and for such purposes and such purposes only the Canal Zone shall be* considered and *treated as an organized Territory of the United States*" (37 Stat. 569; codified in 6 C.Z.C. § 4981, 76A Stat. 547) (emphasis added).

(j) Shipping Act of 1916:

"* * * term 'common carrier by water in interstate commerce' means a common carrier engaged in the transportation by water of passengers or property

on the high seas * * * from port to port *between one State, Territory, District, or possession of the United States and any other State, Territory, District, or possession* * * * *or between places in the same Territory, District, or possession*" (39 Stat. 728, 46 U.S.C. § 801) (emphasis added).

(k) Packers and Stockyard Act of 1921:

"* * * term 'commerce' means commerce *between any State, Territory or possession,* or the District of Columbia, and any place outside thereof; * * * *or within any Territory or possession,* or the District of Columbia * * *" (42 Stat. 159, 7 U.S.C. § 182(6)) (emphasis added).

(l) Motor Carrier Act of 1935:

"* * * term 'foreign commerce' means commerce * * * *between any place in the United States and any place in a Territory or possession of the* United States * * *" (49 Stat. 544, as amended by Act of September 1, 1950, § 1(b), 64 Stat. 574; 49 U.S.C. § 303(a)(11)(B)) (emphasis added).

(m) National Labor Relations Act (1935):

"* * * term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or *between the District of Columbia or any Territory of the United States and any State or other Territory, or between* any foreign country and *any* State, *Territory,* or the District of Columbia. *or within* * * * *any Territory,* or between points in the same State but through any other State or *any Territory* or the District of Columbia * * *" (49 Stat. 450, 29 U.S.C. § 152(6)) (emphasis added)

(n) Federal "Anti-Racketeering" Act (1951):

"* * * term 'commerce' means commerce within the District of Columbia, or any *Territory or Possession* * * * all commerce *between any point in a State, Territory, Possession,* or the District of Columbia

and any point outside thereof * * *" (18 U.S.C. § 1951 (b)(3); derived from Act of June 18, 1934; 48 Stat. 979) (emphasis added).

(c) Aviation Act of 1958:

"* * * 'overseas air commerce' * * * mean[s] the carriage by aircraft of persons or property for compensation or hire * * * in commerce *between* * * * *a place in any State* * * * or the District of Columbia, *and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession* of the United States * * *" (72 Stat. 738, 49 U.S.C. § 1301 (20)(b)) (emphasis added).

Section 3 of the Sherman Act, set forth above, page 2, refers only to "Territories" and to the District of Columbia; it does not refer to other land areas under the jurisdiction of the United States. Section 7, the remaining provision of the Sherman Act which refers to "Territories," likewise does not refer to general land areas. In defining "person," it provides:

> "The word 'person' * * * in sections 1-7 of this title shall be deemed to include corporations * * * authorized by the laws of either the United States, the laws of *any of the Territories*, the laws of any State, or the laws of any foreign country" (26 Stat. 210, 15 U.S.C. § 7). (emphasis added).

In 1914, in enacting the Clayton Act and Federal Trade Commission Act, Congress again showed that it recognized the distinction between "Territory" as an organized land area, on the one hand, and other places within the jurisdiction of the United States.[6]

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6. In the present case there is no dispute as to the power of Congress under Art. IV, Sec. 3, cl. 2, to make the Sherman Act applicable to American Samoa if it wishes to do so. But as shown by

The Clayton and Federal Trade Commission Acts were enacted as supplements to the Sherman Act (Act of October 15, 1914, 38 Stat. 730; Act of September 26, 1914, 38 Stat. 717). Both were considered concurrently.

The Clayton Act defines "commerce" as follows:

> "'Commerce,' as used herein, means trade or commerce among the several States * * * or between the District of Columbia or any *Territory of the United States* and any State * * * *or between any insular possessions or other places under the jurisdiction of the United States,* or between *any such possession or place and any State or Territory of the* United States * * *" (38 Stat. 730, 15 U.S.C. § 12) (emphasis added).

When Congress provided that the Clayton Act should apply to insular possessions and other places within the jurisdiction of the United States, it specifically recognized that it was enacting a provision broader than that contained in the Sherman Act. The House Report states:

> "Section 1 of the bill [i.e., Clayton Act] defines technically for purposes of this bill certain words, phrases, and terms used in the body of the bill. * * * The definition of commerce * * * *is broadened so as to include trade and commerce between any insular possessions or other places* under the jurisdiction of the United States, *which at present do not come within the scope of the Sherman antitrust law * * * The act* approved July 2, 1890, and *commonly referred to as the Sherman Law* * * * [is] *restricted in application to commerce among the several States and Territories, the District of Columbia, and with foreign nations*" (H.Rept. No. 637, 63d Cong. 2d Sess. (1914), pp. 7-8) (emphasis added).[7]

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the text, Congress has not exercised the full extent of its power over all land areas in Section 3 of the Sherman Act, but only with respect to a specific type of land area, i.e., "Territory." Statements such as those in footnote 3, page 5, of the government's Jurisdictional Statement are, therefore, irrelevant.

7. The Clayton Bill, as originally introduced, defined commerce in the same terms as the Sherman Act (See H.R. 15657, 63d Cong.,

The Federal Trade Commission Act, which accompanied the Clayton Act, was limited to a definition of "commerce" similar to that found in the Sherman Act. Section 4 of the Federal Trade Commission Act provides:

> "'Commerce' means commerce among the several States * * * *or in any Territory of the United States* or in the District of Columbia, or *between any such Territory and another*, or *between any such Territory* and any State * * * or between the District of Columbia and any State or *Territory* or foreign nation" (38 Stat. 719, 15 U.S.C. § 44) (emphasis added).

The bill, as originally introduced, defined commerce as broadly as did the Clayton Act, although in different terms:

> "'Commerce' means such commerce as Congress has the power to regulate under the Constitution" (H.R. 15613, 63d Cong., 2d Sess., § 6).

That the bill, as enacted, contained a narrower definition of commerce was clearly understood. The House debates show the following exchange:

> "MR. SHERLEY. In the bill as it passed the House the definition of commerce was, in substance, that over which Congress has jurisdiction by virtue of the Constitution of the United States. In the bill as agreed to in conference the definition of commerce would seem to exclude commerce with any possessions of the United States that were not States or Territories or the District of Columbia.
>
> "MR. COVINGTON. That is correct" (51 Cong. Rec. 14927 (September 10, 1914)).

2d Sess., § 1). In subsequent revisions by the House Judiciary Committee, the definition of commerce was expanded to include trade between insular possessions and other places within the jurisdiction of the United States, as well as between the States, Territories, and foreign nations (H.Rept. No. 637, 63d Cong., 2d Sess. (1914), p. 1). This broadened definition of "'commerce'' only applies to the Clayton Act (51 Cong. Rec. 9088 (May 22, 1914); 51 Cong. Rec. 12988 (July 30, 1914); 51 Cong. Rec. 13848 (August 17, 1914)).

As to the reasons for this limitation of jurisdiction of the Federal Trade Commission, one of the managers of the bill stated:

> "The reason was that we did not think that the scope of the commission should be extended that far, to embrace our foreign possessions. That conditions there are so different than here that they could be handled by local authorities better than by a commission 7,600 miles away in the city of Washington. If the scope of the commission needs to be extended hereafter to any of them, it can be done, but at present we thought it would hamper rather than to help business there and here" (51 Cong. Rec. 14935 (September 10, 1914)).

When Congress has intended the term "Territory" in a statute to mean something other than an *organized* territory it has so stated. In addition to the examples quoted above, the Wool Products Labeling Act, for instance, provides: "[t]he term 'Territory' includes the insular possessions of the United States, and also any Territory of the United States" (Act of October 14, 1940, § 2(i), 54 Stat. 1129; 15 U.S.C. § 68(i)). Here, as uniformly elsewhere, Congress has expressly recognized the historical distinction it has made between "Territory" and other possessions over which it has jurisdiction.

B. Cases Recognizing the Statutory Distinctions Between Territories and Other Possessions.

This Court and the lower Federal courts have, without exception so far as we have been able to determine, recognized the distinction made by Congress between "Territories" and other areas under the general sovereignty of the United States.

In *Ex Parte Morgan* (W.D.Ark. 1883) 20 Fed. 298, a case involving the meaning of "Territory" in the Extradi-

tion Statute (R.S. § 5278), the issue was whether the Chief of the Cherokee Nation, an area under a local Indian government, was the Executive Authority of a "State or Territory." The court held that he was not. It said:

> "A *territory,* under the constitution and laws of the United States, is an inchoate state,—a *portion of the country not included within the limits of any state,* and not yet admitted as a state into the Union, *but organized under the laws of congress, with a separate legislature, under a territorial governor and other officers appointed by the president and senate of the United States*" (20 Fed. 298, 305) (emphasis added).

In 1890 the Carnal Knowledge Statute was before the Supreme Court in *In Re Lane* (1890) 135 U.S. 443. By its terms, the statute was applicable in areas under the jurisdiction of the United States "except the territories." The issue was whether petitioner, who was alleged to have committed the offense charged within that part of the Indian Territory then known as Oklahoma, which had no organic act, could claim that this was a "territory" within the exception. The Court said that he could not. It held:

> "• • • the words 'except the territories' have reference exclusively to that system of *organized* government long existing within the United States, by which certain regions of the country have been erected into civil governments. These governments have an executive, a legislative and a judicial system. *They have the powers which all these departments of government have exercised, which are conferred upon them by act of Congress; and their legislative acts are subject to the disapproval of the Congress of the United States*";

and added:

> "• • • *they exercise nearly all the powers of government, under what are generally called organic acts passed by* Congress conferring such powers on them.

It is this class of government, long known by the name of Territories, that the act of Congress exempts from the operation of this statute * * *" (In Re Lane* (1890) 135 U.S. 443, 447) (emphasis added).[8]

In *Puerto Rico v. Shell Co.* (1937) 302 U.S. 253, this Court was called upon to decide whether Section 3 of the Sherman Act applied to Puerto Rico. Congress had adopted an organic act for Puerto Rico in 1900, after its cession from Spain (Foraker Act; 31 Stat. 77). A revised organic act had been adopted by Congress in 1917 (Organic Act of March 2, 1917; 39 Stat. 951). The alleged violations had occurred in the 1930's.

The Court said that it was immaterial that Puerto Rico was not a dependency of the United States at the time Section 3 was enacted. The test, it held, was whether Puerto Rico had an organic act at the time of the alleged violations. To quote the Court:

> "Section 3 of the Sherman Act extends to 'any territory of the United States.' * * * The only question, therefore, is whether the word 'territory,' as used in § 3 of the Sherman Act, properly can be applied to a dependency *now bearing the relation to the United States which is borne by Puerto Rico*" (302 U.S. 253, 257) (emphasis added).[9]

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8. *In Re Lane*, holding that the term "Territories" means "organized" Territories, was decided April 28, 1890, just two months before passage of the Sherman Act (July 2, 1890). If Congress had intended the term "Territories" in the Sherman Act to mean something different, it had opportunity so to provide.

9. The District Court opinion (Jurisdictional Statement, p. 12) refers to a dictum in *Shell Co.*, omitted from the above quotation, which stated that when the Sherman Act was passed in 1890, the United States had no insular dependencies (302 U.S. 253, 257). However, this dictum was incorrect.

In the *Insular Cases* (*Downes v. Bidwell* (1901) 182 U.S. 244, 304) Justice White pointed out that numerous islands had been brought within the dominion of the United States under the authority of the Act of August 18, 1856, c. 164 (Guano Islands Act);

As to what Congress meant by "Territory" in the Sherman Act, the Court referred to its earlier decision in *Kopel v. Bingham* (1909) 211 U.S. 468, where it defined "territory" under the Extradition Act (R.S. § 5278):

> "• • • we held in *Kopel v. Bingham* that Puerto Rico was a 'territory' within the meaning of § 5278 of the Revised Statutes, which provides for the demand and surrender of fugitive criminals by governors of territories as well as of states. • • • The word 'territory' as used in that statute was defined as meaning 'a portion of the country not included within the limits of any State, and not yet admitted as a State into the Union *but organized under the laws of Congress with a separate legislature under a territorial governor and other officers appointed by the President and Senate of the United States.*' And the court concluded, 'It may be justly asserted that *Puerto Rico* is a *completely organized Territory* • • • '
>
> "With equal force, it may be said here that there is no reason why Puerto Rico should not be held to be a 'territory' within the meaning of § 3 of the Sherman Act" (302 U.S. 258-259) (emphasis added).

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these included Swains Island, one of the Samoan group, which had been in continuous possession of the United States since at least 1875 (43 Stat. 1357). In 1867, the United States acquired Midway Island, at the western end of the Hawaiian group 1200 miles from Honolulu, and by 1900 had expended $50,000 to make it into a naval station (182 U.S. 244, 304). On renewal of a treaty with Hawaii, November 9, 1887, Pearl Harbor in the Hawaiian Islands was leased as a permanent naval station *(ibid.)*.

Under the Guano Islands Act (1856), Congress granted monopoly rights to the discoverer. Section 2 provided that:

> "The discoverer • • • may be allowed, at the pleasure of Congress, the *exclusive right* of occupying such island, • • • for the purpose of obtaining Guano, and of selling • • • the same to citizens of the United States" (11 Stat. 119, 48 U.S.C. § 1411, et seq.) (emphasis added).

The rights of the United States in the guano islands were known to Congress at the time the Sherman Act was passed. Indeed, two cases involving a guano island were decided shortly thereafter by this Court (*Jones v. United States* (1890) 137 U.S. 202; *Duncan v. Navassa Phosphate Co.* (1890) 137 U.S. 647).

In elaboration, the Court went on:

> "If * * * Congress intended by the Sherman Act to exert all the power it possessed in respect of the subject matter—trade and commerce—, it is equally reasonable to conclude that Congress intended to include all *territories* to which its powers might extend. * * * we hold, accordingly, that the word 'territory' was used in its most comprehensive sense, as embracing *all organized territories,* whether incorporated into the United States or not, including Puerto Rico" (302 U.S. 253, 259) (emphasis added).[10]

In *David Cabrera, Inc. v. Union de Choferes y Duenos* (D. Puerto Rico 1966) 256 F.Supp. 839, the District Court recently held that the statutory term "Territory" referred to an area in a political sense, i.e., as organized, rather than as synonomous with "place" or "area" in the geographical sense. At issue was the meaning of "Territory" as used in the definition of "Commerce" in Section 1 of the Clayton Act. The court said:

> "It is obvious from 15 U.S.C.A. § 12 [Clayton Act, 38 Stat. 730, § 1] that Congress is not using the term 'territory' in its broad meaning. Its use, together with the use within the same statute of the terms 'State', 'District of Columbia', 'foreign nation', 'insular possession' and 'place' under the jurisdiction of the United States, indicates the intent of Congress to be precise

10. In *Shell Co.*, the defendant contended that the term "Territory" meant only incorporated Territory, citing the *Insular Cases* (1901) 182 U.S. 1, et seq. An incorporated Territory is one to which all the guarantees of the Federal Constitution extend (*Downes v. Bidwell* (1901) 182 U.S. 244, 299 (White, J., concurring)). An "unincorporated" Territory is one to which only a part of the constitutional guarantees extend, the remainder (if any) being defined in a statutory bill of rights included under the organic act (see, e.g., Organic Act of Guam, Aug. 1, 1950; 64 Stat. 384, as amended; 48 U.S.C. § 1421, et seq.).

In *Shell Co.*, the Court refused to limit the term "Territory" to incorporated Territory; as noted, it employed the term in its broadest sense as used by Congress, i.e., as including all organized Territories (302 U.S. 253, 258-259).

in the terminology used in this statute. The above intent was to refer to territory in its political sense" (256 F.Supp. 839, 842).

The same analysis, of course, applies to the use of the term "Territory" in Section 3 of the Sherman Act; there the Act within the same section uses the terms "State," "District of Columbia," and "foreign nation." As noted by this Court in analyzing the meaning of "States":

> "Ordinarily these terms ['States of the Union'] would be held to apply to those political communities exercising various attributes of sovereignty which compose the United States, *as distinguished* from *the organized municipalities* known as *Territories and the District of Columbia" (Geofroy v. Riggs* (1890) 133 U.S. 258, 268) (emphasis added).

While the government makes broad arguments (Jurisdictional Statement, pp. 6-8) that the term "Territory" in Section 3 must be construed to include all land areas, these arguments are based upon what the government wishes the statute might have been, not on what the statute says. In *Shell Co.,* as elsewhere, the Court recognized that the term "Territory" in a statute, though used in its most comprehensive sense, still has a meaning which does not include all land areas (302 U.S. 253, 259).[11]

C. American Samoa Is Not a Territory.

American Samoa is not a "Territory" within the meaning of the Sherman Act. It is an unorganized insular possession. Until it receives an organic act from Congress, it will remain in its present status.

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11. In *Vermilya-Brown Co. v. Connell* (1948) 335 U.S. 377, 388, cited by the government, this Court noted that the National Labor Relations Act in its reference to "Territory" has a more limited jurisdictional scope than other acts of Congress, which refer to "Territories or possessions" (e.g., Fair Labor Standards Act of 1938, 52 Stat. 1060; 29 U.S.C. § 203(c), which provides "'State' means any State of the United States or the District of Columbia or any Territory or possession of the United States").

In 1900, three days after the treaty which awarded the islands of Eastern Samoa to the United States (1 Treaties 277, 31 Stat. 1879), the President by Executive Order placed the islands of Eastern (American) Samoa under Naval Administration. The order provided:

> "The Island of Tutuila, of the Samoan group and all other islands of the group east of Longitude 171 degrees west of Greenwich are hereby placed under the control of the Department of the Navy, for a Naval Station. The Secretary of the Navy will take such steps as may be necessary to establish the authority of the United States, and give to the islands, the necessary protection" (Executive Order, President McKinley, February 19, 1900).

In 1929, when Congress accepted the 1900 and 1904 cessions of the six principal islands of American Samoa by the Samoan Chiefs, it did not adopt an organic act for the area.[12] Instead, in its resolution of acceptance, Congress stated:

> "Until Congress shall provide for the government of such islands, all civil, judicial, and military powers shall be vested in such person or persons and shall be exercised in such manner as the President shall direct; and the President shall have power to remove said officers * * *" (Resolution of February 24, 1929, 45 Stat. 1253; 48 U.S.C. § 1661(c)).[13]

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12. Swains Island, as previously noted (p. 6), was unilaterally placed under the control of the United States in 1925, by resolution of Congress. The resolution did not provide an organic act (Resolution of March 4, 1925, 43 Stat. 1357; 48 U.S.C. § 1662).

13. In *Smith v. Government of Virgin Islands* (3 Cir. 1967) 375 F.2d 714, the Court of Appeals held that a nearly identical resolution did not create organic status for the Virgin Islands (acquired from Denmark in 1917; 39 Stat. 1132). The Court said that "Congress had not established for them a formal or detailed plan of government, but had adopted a stopgap arrangement * * *" (375 F.2d 710). An organic act was enacted for the Virgin Islands in 1936 (49 Stat. 1807, 48 U.S.C. § 1405, et seq.).

In 1951, the President transferred administration of American Samoa from the Secretary of the Navy to the Secretary of the Interior. The order provided that:

> "When the transfer of administration made by this order becomes effective, the Secretary of the Interior shall take such action as may be necessary and appropriate, and in harmony with applicable law, for the administration of civil government in American Samoa" (Executive Order No. 10264, June 29, 1951, 16 F.R. 6419, par. 3).[14]

Since 1951, American Samoa has been under the control of the Department of the Interior, with a civilian governor and other officials being appointed by the Secretary of the Interior or with his consent. Although a measure of self-government was granted American Samoans under a local constitution adopted in 1961, revised in 1968, this "constitution is but an administrative order, subject to the will of the Executive in Washington" (1961 Study Mission Report, p. 5).

Under the administration of the Department of the Interior, the government has followed a policy of preserving the Samoan way of life. This way of life is reflected in the tribal ("matai") system. The matai are the chiefs of the families or tribes (Aiga). Each tribe communally owns

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14. The Navy did "little to disturb the Samoan system of local government," choosing always to pursue a policy of "indirect rule through the Samoan chiefs" (Study Mission to Eastern [American] Samoa, Senate Comm. on Interior and Insular Affairs, *Report Pursuant to S.Res. 330, 86th Cong., 2d Sess.*, S.Doc. 38, 87th Cong., 1st Sess. (1961) [hereinafter "1961 Study Mission Report"], p. 112). The Navy's basic policies included:

"(a) Nonalienation of Samoan lands.
(b) Preservation of Samoan customs.
• • • • •
(e) Samoa for the Samoans."

(Darden, *Historical Sketch of the Naval Administration of the Government of American Samoa, April 17, 1900-July 1, 1951* (1952), p. xiii).

the lands surrounding its villages. In excess of 96 per cent of the land in American Samoa is tribal owned, not subject to alienation, and used strictly in accordance with the direction of the matai of the tribe to which it belongs (1961 Study Mission Report, p. 124).

All affairs of each tribe are settled in its own council presided over by the matai (1961 Study Mission Report, p. 113). In 1932 hearings on American Samoa, Congressman Beedy said:

> "I think these people are the happiest I have ever known. They live as near to the communistic theory as any people I have ever contacted. There is no such thing as individual ownership of lands. Title to these lands comes on down through generations in the family.
>
> "The family group is presided over by a 'matai,' or chieftan. His word is law within the family group. He presides over a group ordinarily ranging from 30 to a hundred or more in numbers" *(Hearings on H.R. 9698 Before the House Comm. on Insular Affairs,* 72d Cong., 1st Sess. (1932), p. 14);

adding:

> "Our whole thought has been * * * *to keep the hand of the white man out of their affairs* just as much as possible. I am not sure but what, in the eyes of the Ruler of Nations, they have devised a finer system of living than many so-called great nations" (*id.,* p. 18) (emphasis added).

In 1931, 1933, 1935, 1937, 1947, and again in 1949, organic acts were proposed for Samoa, but failed to pass in Congress (S. 5621, H.R. 15989, 71st Cong., 1st Sess. (1931); S. 417, H.R. 9698, 72d Cong., 2d Sess. (1932); S. 1574, H.R. 8749, 73d Cong., 2d Sess. (1933); S. 3113, H.R. 11044, 74th Cong., 1st Sess. (1935); S. 1095, H.R. 4946, 75th Cong., 1st Sess. (1937); S. 1898, H.R. 3564, 80th Cong., 1st Sess. (1947); S. 184, H.R. 4500, 81st Cong., 1st Sess. (1949)). The reasons were essentially that Samoans feared that

an organic act would destroy their way of life, with its government through the matai system of chieftains, and its restrictions on alienation of land to non-Samoans.[15] As stated in the 1961 Study Mission Report (p. 125), if American Samoa were

> "opened to unrestricted economic exploitation * * *, it is the consensus of opinion that it would only be a matter of time before the Samoan way of life would disappear. Samoans refer to the history of their Polynesian relatives in Hawaii * * * as proof of basis for this fear."

In 1970, a special commission was appointed by the Samoan "fono" (legislature) to study alternative forms of political status open to American Samoa and to assess the advantages and disadvantages of each (11th Samoan Legislature, First Special Session, July 1969, P.L. 11-39). The Commission considered the following alternatives: (1) independence; (2) union with Western Samoa; (3) becoming an incorporated territory of the United States under an Organic Act; (4) Commonwealth status similar to Puerto Rico's; (5) becoming a county within the State of Hawaii; and (6) "[r]etaining American Samoa's present status as an unincorporated insular possession of the United States" (*Report from the Future Political Status Study Commission to the Eleventh Legislature of American Samoa, Second Regular Session* (February 9, 1970) [hereinafter "Political Status Report"], pp. 1-3).

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15. In 1950, a congressional committee reported that Samoans favored an organic act only under certain conditions (Report to Public Lands Committee on the Pacific Islands, 81st Cong., 2d Sess. (1950), p. 2). For example, Samoans did *not* want an Act which prevented "involuntary servitude" because it would "destroy an integral part of the matai system." Even more startling, the Committee recommended acceptance of the condition, saying:

> "[The committee] regards the matai system as undemocratic and inconsistent with American principles, but at the same time it recognizes the upheaval that would follow if so ancient and strongly rooted a tradition were legislated out of existence" (*id.*, p. 7).

The Commission in its report to the Samoan legislature noted the advantages and weaknesses of the various alternatives; it recommended, in essence, a retention of the status quo. The Commission said that it did not believe that organic act status was feasible or desirable at the present time, and recommended against an organic act. It said:

> *"The major disadvantage of Organic Act status would be the threat it would pose to the traditional Samoan social structure.* Even if Congress could be persuaded to allow local legislation protecting the Samoan land-tenure and matai-title systems, such legislation might well be held unconstitutional. As the Honorable Albert B. Maris, while a judge of the Third Circuit, United States Court of Appeals wrote to the Secretary of the Interior on October 3, 1960: '. . . the people of Samoa, as their constitution indicates, cling with remarkable tenacity to their ancient customs and their communal family land holdings and way of life with its matai system of titled and privileged heads of families set above the untitled people of the community. *For 60 years the United States has recognized and supported these customs. But they are wholly inconsistent with our American System of individual enterprise and property rights and they would, therefore, be doomed to ultimate destruction if we should set upon a course of preparing the people for American citizenship with the accompanying constitutional obligation to accord stateside American citizens equal rights in property and commerce in Samoa'"* (Political Status Report, pp. 16-17) (emphasis added).

In short, it is true today, as it was in 1947 when the United States reported to the Secretary General of the United Nations, that

> "American Samoa is classified as an *unorganized United States possession*" (1947 Annual Report to the Secretary General of the United Nations pursuant to Article 73(e) of the Charter, p. 30) (emphasis added).

That the Sherman Act, or any other statute limited in its applicability to "Territories," does not extend to an unorganized possession such as American Samoa, both as a matter of Congressional intent and as a matter of judicial interpretation, is clear from the authorities above set forth. A further well-reasoned opinion of the National Labor Relations Board in *Star-Kist Samoa Inc.* (N.L.R.B. 1968) 68 L.R.R.M. 1532, is directly on point. The National Labor Relations Act extends, in words almost identical to Section 3 of the Sherman Act, to:

> "* * * trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or *any Territory of the United States and any State or other Territory,* * * * or within * * * any *Territory* * * *" (49 Stat. 450, 29 U.S.C. § 152(6)) (emphasis added).

The issue before the Board was whether the Act extended to American Samoa. The Board found that it did not:

> "American Samoa is neither 'incorporated' nor 'organized.' It does not have even a rudimentary government established by Congress, but rather one established by the executive branch in the person of the Secretary of the Interior, to whom administrative authority was delegated by the President. It is not specifically included as a territory in Section 14(c)(2). Further distinguishing American Samoa from those dependencies of the United States which have been found to be 'Territories' is the fact that its inhabitants, while American Nationals, are not citizens, that it is not within the jurisdiction of any Circuit Court, and that it has no Federal District Court" (68 L.R.R.M. 1533).

The Board held:

> "Under all of the relevant circumstances, particularly the fact that Congress has not established any form of self government for American Samoa, and

in the absence of a clear Congressional mandate, we conclude that American Samoa does not come within the jurisdiction of the Act" (68 L.R.R.M. 1533).[16]

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the District Court should be affirmed, or in the alternative that the appeal should be dismissed for lack of a substantial Federal question.

Respectfully submitted,

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16. The government suggests (Jurisdictional Statement, p. 7) that there is something startling in the holding below that Congress has excepted the economic development of American Samoa "from the principles of free competition which underly the Sherman Act." Yet the holding is hardly surprising, in view of the fact that Congress has similarly excepted American Samoa from the National Labor Relations Act, the Civil Rights Acts of 1866, 1870 and 1871, and from basic constitutional guarantees—all of which are of no lesser significance than the Sherman Act.